RECENT CASES.

BANKS AND BANKING—LIABILITY OF DIRECTORS FOR NEGLIGENT MANAGEMENT.—In Kavanaugh v. Gould, 131 N. Y. Sup. 1059 (1911), the Supreme Court of New York held that the directors of a banking corporation were not bound to a strict supervision of the affairs of the company and were not liable for losses caused by the mismanagement of the president and executive committee to whom they had delegated the details of management. The lower court had held that the directors were bound to a very strict standard of duty. Kavanaugh v. Commonwealth Trust Co., 64 N. Y. Misc. 303 (1909).

The cases differ as to whether the liability of directors to the corporation and its share holders is to be determined by the application of the rules of agency, Briggs v. Spaulding, 141 U. S. 132 (1890); Swentzel v. Pennsylvania Bank, 147 Pa. 140 (1892), or whether the directors are to be treated as trustees handling the property of the company in a fiduciary capacity. Savings Bank v. Caperton, 87 Ky. 306 (1888); Cooper v. Hill, 94 Fed. 582 (1899). An analysis of the cases shows that the courts do not strictly apply either standard and that ordinary business practices really set the standard, Yates v. Jones Nat'l Bank, 206 U. S. 158 (1907); Stone v. Rotman, 183 Mo. 552 (1904).

The directors are bound to give as much time and attention to the affairs of the corporation as is customary in similar companies. Commercial Bank v. Chatfield, 121 Mich. 641 (1899); Emerson v. Gaither, 103 Md. 504 (1906). Modern business requires that there be directors on the boards of various corporations whose duties are to shape the general policy, and to give advice, counsel and assistance in the larger financial matters. Such men are too busy to give any attention to matters of detail but their services are too valuable to lose. The law, as in the principal case, follows business in this matter and does not hold these directors liable for the acts of their co-directors where they had no part in, or knowedge of, any mismanagement. Murphy v. Penniman, 105 Md. 452 (1907); Wait v. McKee, 128 S. W. 1028 (Ark., 1910); Foutz v. Miller 112 Md. 458 (1910).

CONTRACTS—OFFER AND ACCEPTANCE.—The decision in Western Union Telegraph Co. v. Allen, 119 Pac. Rep. 981 (Okla., 1911), is another contribution, though slight, to the law of offer and acceptance. An offeror stipulated to his offeree that acceptance should be by wire. The offeree accordingly sent a telegram of acceptance which was, however, never delivered by the telegraph company. The court said that where a party making an offer stipulates the method of acceptance, he is bound by an acceptance in that method, whether he receives it or not, and this rule applies to the telegraph as well as the post.

In British & American Telegraph Co. v. Colson, L. R. 6 Exch. 108 (1871), an acceptance posted to but never received by the offeror was held not to complete a contract; and as late as 1879, Bramwell, B., contended that though, if it is ultimately received, an acceptance sets the time of completion of a contract at the time of its having been posted, yet if never received at all, no contract has been completed. This was in the dissenting opinion in Household Insurance Co. v. Grant, L. R. 4 Exch. 216 (1879), in which the majority ruled definitely that an acceptance is binding upon both parties from the moment it is posted, even though it never reaches the offeror.

The American courts follow this majority opinion, except of course where there is a stipulation in the offer that the acceptance must be received by the offeror, as in Haas v. Myers, 111 Ill. 421 (1884). Another exception is

represented by Lucas v. Western Union Telegraph Co., 131 Iowa 669 (1906), which decides that if an offer made by mail is accepted by wire, the contract is complete only when the acceptance reaches the offeror. This opinion is based on the "common agency" theory, which was exploded in Henthorn v. Fraser, L. R. 2 Ch. (1892) 27.

Cases which represent the general rule, as stated in the Oklahoma opinion, are Hallock v. Insurance Co., 26 N. J. L. 281 (1857); Vassar v. Camp, 11 N. Y. 441 (1854); Watson v. Russell, 149 N. Y. 388 (1896); Mortgage Co. v. Davis, 96 Tex. 504 (1903); and Burton v. U. S., 202 U. S. 344 (1906). In Trevor v. Wood, 36 N. Y. 307 (1867), it was said that where the offeror stipulates that acceptance shall be by wire, he assumes the hazards of that means of communication, and the contract is completed when the offeree files his telegram for transmission.

There has been much discussion as to the moment of completion of a contract where the parties are at a distance from each other, because, as Charles Noble Gregory explains in 39 American Law Register (N. S.) 354 (1900): "A contract, like a man, is generally a citizen of the country not in which it was begotten, but in which it was born."

DAMAGES—BREACH OF CONTRACT—MENTAL SUFFERING.—A prospective patron of a Coney Island bathing establishment had purchased a ticket, and was standing in line with other patrons, waiting to exchange the ticket for a key admitting to a bath-room. A dispute arose between her and the proprietor of the bath-houses over the giving a key to a person not in line. The result was that she was ejected from the defendant's premises. She sued for breach of contract and claimed damages for the mental suffering incurred through her public humiliation. *Held*, that such compensatory damages may properly be recovered. Aaron v. Ward, 96 N. E. 736 (N. Y., 1912).

One of the most firmly established rules of the law of damages is that there can be no compensation awarded for mental pain and suffering. Lynch v. Knight, 9 H. L. C. 577 (Eng., 1861). This holds true whether the action is based on tort or on contract. But there seem to be several well recognized exceptions when the suit is founded on a broken contract. Of these exceptions, the most important occurs where the suit is for breach of promise to marry. In such case damages for mental suffering are allowed. Coolidge v. Neat, 129 Mass. 146 (1880); Vanderpool v. Richardson, 52 Mich. 336 (1883). Another exception is made when a telegraph company contracts to deliver a message, and has, or ought to have, notice that failure to deliver it will cause mental pain. Beasley v. Western U. T. Co., 39 Fed. 181 (1889); Wadsworth v. Western U. T. Co., 86 Tenn. 695 (1888). A still further exception allows damages when the breach of contract is the negligent handling of a corpse. In this case, members of the deceased's family may recover for the shock and mental anguish they have suffered. Dunn v. Smith, 74 S. W. 576 (Tex., 1903.)

New York has apparently added another exception to the rule. Damages are allowed for the humiliation arising from exclusion from a place of amusement, in an action for breach of contract to admit thereto. The principal case applies this exception where the plaintiff was excluded from a public bathing establishment. In Smith v. Leo, 92 Hun 243 (N. Y., 1895), it was applied where defendant was proprietor of a dance hall.

Many jurisdictions follow this New York exception and some even extend it to cases where the plaintiff was excluded from any place of a public character, *e. g.*, a picnic pavilion, O'Meallie v. Moreau, 41 So. 243 (La., 1906); an amusement park, 35 Wash. 203 (1904); a race track, Greenberg v. Western Ass'n, 140 Cal. 357 (1903).

Other jurisdictions hold strictly to the doctrine of refusing to allow such damages. Horney v. Nixon, 213 Pa. 20 (1905); Taylor v. Cohn, 47 Or. 538 (1906); Buenzle v. Newport Ass'n, 68 Atl. 721 (1908).

DECEIT—LIABILITY FOR INTENTIONALLY MAKING A FALSE PROMISE.—A false promise to do an act in the future, which the promisor has no present intention of doing, will support an action for deceit. Sallies v. Johnson, 81 Atl. Rep. 974 (Conn., 1911).

It is settled law that, to be actionable, a misrepresentation must relate to a past or existing fact; and a bona fide promise to do an act in the future accordingly can never be the subject of a false representation, since it cannot be false at the time it is made. Smith v. Parker, 148 Ind. 127 (1897); Long v. Woodman, 58 Me. 44 (1870); Syracuse Knitting Co. v. Blanchard, 69 N. H. 447 (1899); Taylor v. Commercial Bank, 174 N. Y. 181 (1903). So, too, promises made as to facts that will probably transpire in the future are mere expressions of opinion, and, when false, cannot be made the ground of an action for deceit. Pedrich v. Porter, 5 Allen 324 (Mass., 1862); Murray v. Becksmith, 48 Ill. 391 (1867); Lexon v. Julian, 21 Hun 571 (N. Y., 1880); Saunders v. McClintock, 46 Mo. App. 216 (1891). Nor does an expression of judgment or opinion amount to a warranty. Medbury v. Watson, 6 Metc. 246 (Mass., 1846); Ellis v. Andrews, 56 N. Y. 83 (1874); Fulton v. Hood. 34 Pa. 365 (1859); Bristol v. Bradwood, 28 Mich. 191 (1873).

When, however, as in the principal case, the promise is one made with no intention whatever of carrying it out, one of two views is possible. Some courts hold that such statements are either express or implied assertions of present intention to execute the promise; and therefore, since intent is as much a fact as anything else, the action of deceit will lie on this misrepresentation of present intention as a fact. Oldham v. Bentley, 45 Ky. 428 (1846); French v. Ryan, 104 Mich. 625 (1895); Cockerill v. Hall, 65 Cal. 326 (1884); Am. Hosiery Co. v. Baker, 18 Ohio Cir. Ct. Rep. 604 (1899); Clydesdale Bank v. Paten, 65 L. J. P. C. 73 (Eng., 1896); Rogers v. Virginia C. C. Co., 149 Fed. 1 (1907). This doctrine is not followed, however, by the majority of the courts. In their opinion, in order to sustain the action, the false representation must be of a fact, and a fact only; and a false statement as to intention to execute a future act is not, in itself, a misrepresentation of an existing fact, but only a statement of an opinion which is not actionable. Hartlesville Univ. v. Hamilton, 34 Ind. 506 (1870); Knowlton v. Keenan, 146 Mass. 86 (1888); O'Ray v. Palmer, 25 N. Y. Super. Ct. 500 (1863); Dickenson v. Atkins, 100 Ill. App. 401 (1902); Schrofft v. Fid. Trust Co., 73 N. J. L. 57 (1906); J. H. Clark Co. v. Rice, 127 Wis. 451 (1906).

EQUITY—ENFORCEMENT OF STATUTORY PENALTIES.—In State, *ex rel.*, Att'y-Gen. v. Marshall, 56 S. E. Rep. 792 (Miss., 1911), suit was instituted by the state to have the defendant's illegal sales of liquors suppressed as a nuisance, and for an injunction against the further conduct of the business, and for a decree for penalties. The court abated the nuisance and rendered judgment for the statutory penalties, holding that although a court of equity will refuse to enforce a penalty imposed by private contract, it will not refuse to enforce penalties created by statute.

It is well settled that equity will not interfere to relieve a penalty or forfeiture imposed by statute. Chandler v. Crawford, 7 Ala. 506 (1845); Cross v. McClenahan, 54 Md. 21 (1880); Clark v. Bernard, 108 U. S. 436 (1882); Cameron v. Adams, 31 Mich. 426 (1875); Pom. Eq. Juris., Sec. 458. On the question of enforcing a statutory penalty the courts are divided. Where the penalty is enforced it is generally on the ground of public policy, as being an expression of the will of the law-making power, which the courts of equity will not undertake to disregard. State v. Hall, 70 Miss. 678 (1893); Chapman v. State, 5 Or. 432 (1875). In other jurisdictions equity has refused to enforce the penalty, extending the equitable doctrines governing in case of contract, to statutory regulations. Broadnax v. Baker, 94 N. C. 675 (1886); Thompson v. N. Y. & H. R. Co., 3 Sandf. Ch. 625 (N. Y., 1846); Gordon v. Lowell, 21 Me. 251 (1842).

EVIDENCE—ADMISSIBILITY OF STATEMENTS OF THE PROSECUTRIX IN AN INDICTMENT FOR RAPE.—In a prosecution for rape, where the prosecutrix died before trial, a statement that she had been raped, made by her immediately after the commission of the crime, was offered in evidence. The court held that such statements are admissible only to corroborate the testimony of the prosecutrix given upon the trial, and if the prosecutrix is not a witness, they are not admissible. People v. Lewis, 96 N. E. 1005 (Ill., 1911).

Complaints of rape have been admitted by the courts upon three possible principles: 1. As an explanation of a self-contradiction. Thus evidence that a complaint was in fact made is admitted when the failure of the woman, at the time of the alleged rape, to make any complaint would be a virtual self-contradiction, discrediting her present testimony. 2. As a corroboration of other similar statements. Thus the story of the woman is corroborated by showing that she told the same story at the time of making complaint. 3. As a *res gestae* declaration.

Under the first two principles the woman must be a witness, for (1) there can be no inconsistency between the woman's present testimony and her former silence if she has not testified at all, and (2) there can be no corroboration of testimony never given. The principal case was decided upon the second of these principles and is in accord with the weight of authority both in England and America. Regina v. Guttridges, 9 C. & P. 471 (1840); People v. Graham, 21 Cal. 261 (1862); Weldon v. State, 32 Ind. 81 (1871); State v. Meyers, 46 Nebr. 152 (1895); Wigmore, Ev., Secs. 1134-1140.

A few American courts have received the complaints as testimony as spontaneous or *res gestae* declarations, and in such a case the woman need not be a witness. McMurrin v. Rigly, 80 Iowa 325 (1890); Snowden v. U. S., 2 D. C. App. 89 (1893); McMath v. State, 55 Ga. 303 (1875); People v. Lynch, 29 Mich. 274 (1874); State v. Fitzsimon, 18 R. I. 236 (1893).

EVIDENCE—ADMISSIBILITY OF TESTIMONY OF A DIVORCED WIFE ON BEHALF OF HER FORMER HUSBAND.—In an action by a husband for criminal conversation his divorced wife was allowed to testify in his behalf. Schefler v. Robinson, 141 S. W. 485 (Mo., 1911).

At common law husband and wife are incompetent to testify for or against each other while the marriage relation lasts. Lucas v. State, 23 Conn. 18 (1854); Wilke v. People, 53 N. Y. 525 (1873); Schultz v. State, 32 Ohio St. 276 (1877). The reasons which are generally given for this rule are, that to allow testimony would cause dissension, that interests are alike, that it is necessary to preserve marital confidence, and that the testimony is liable to be biased. Kelly v. Proctor, 41 N. H. 139 (1860). The courts in applying the common law rule to the testimony of a divorced husband or wife took into consideration the reasons for its origin. Practically all the cases refuse to allow husband or wife to testify to anything which would break the confidence reposed in them during the marital state, even after divorce. Wharton on Evidence, 2nd Ed., Sec. 429, and cases cited.

But aside from this prohibition, the general rule seems to be that a divorced husband or wife may testify for, but not against, the other. The reasons for the rule of common law having been removed there is no reason to exclude the testimony. Dickerman v. Graves, 60 Mass. 308 (1850); Ratcliff v. Wales, 1 Hills 63 (N. Y., 1841).

The competency of husband and wife as witnesses has been largely regulated by statute. In England husband or wife is competent to testify in all cases for the other. About one-third of the states have passed similar statutes. Wigmore's Evidence, vol. 1, sec. 488. The remainder of the states still retain the common law rule.

LIBEL—PUBLICATION OF A STATEMENT THAT A LIVING MAN IS DEAD.—Cohen v. N. Y. Times Co., 132 N. Y. Sup. 1 (1911), decides that it is libel *per se* to publish a statement that a living man is dead.

It is a general rule that defamatory *oral* words are actionable without

allegation or proof of special damage where the words, (1) charge the plaintiff with the commission of a crime which is punishable corporally or which involves moral turpitude. Brooker v. Coffin, 5 Johns. (N. Y.) 188 (1809); Davis v. Carey, 141 Pa. 314 (1891); (2) disparage the plaintiff in the way of his profession, trade, or office of public trust, Montgomery v. New Era Print, 229 Pa. 165 (1910); Jones v. Littler, 7 M. & W. (Eng.) 423 (1841); Livingston v. McCartin [1907] Vict. L. R. (Eng.) 48; (3) impute a loathsome disease tending to exclude him from society, George v. Burt, 6 Allen (Mass.) 336 (1863); (4) impute unchastity. At common law, since adultery or fornication were not criminal offenses, such imputations were not actionable *per se,* Roberts v. Roberts, 33 L. J. Q. B. (Eng.) 249 (1864), but the rule has been changed in nearly all jurisdictions either (*a*) by judicial decision, Battles v. Tyson, 77 Neb. 563 (1906); (*b*) by statute, expressly giving a right of action for such imputations, Colby v. McGee, 48 Ill. App. 294 (1892); or (*c*) by statute making such acts of unchastity indictable. Page v. Merwin, 54 Conn. 426 (1887).

If the words be *written* they are actionable if they belong to any of the above classes, or tend to injure the plaintiff's reputation by exposing him to contempt, hatred, or ridicule. Words of the latter class, if oral, are not actionable unless special damage has been suffered, Thorley v. Lord Kerry, 4 Taunton (Eng.) 355 (1812); Solverson v. Peterson, 64 Wis. 198 (1885); Kimmis v. Stiles, 44 Vt. 351 (1872).

From the facts of the principal case it is obvious that the statement involved does not belong to any of the four classes noted above, so that the only possible ground in which it could be held libellous is that it tends to expose the plaintiff to contempt, hatred, or ridicule. There is probably only one case where the same facts existed as in the recent New York case,—McBride v. Ellis, 9 Rich. 313 (S. C., 1856). It was similarly decided. However the fact that Odgers, Libel & Slander, (3rd ed.), p. 20, says merely that "an obituary notice of a living person may be a libel," citing that case, seems to evidence a doubt in the author's mind as to its authority, in the light of the positive terms used in referring to other illustrations. And it seems questionable whether an obituary notice of a living person would in any way tend to expose him to ridicule.

MANDAMUS—REINSTATEMENT OF A MEMBER EXPELLED FROM A SOCIAL CLUB.—In Barry v. The Players, 132 N. Y. Sup. 59 (1911), the relator in the application for a mandamus was the author of a magazine article disparaging the intellectual qualities of the members of the dramatic profession, The respondent, a club incorporated for literary and social purposes and composed mostly of the dramatic profession, expelled the relator. A mandamus compelling his reinstatement was granted, the majority of the court holding that a corporation for social purposes cannot expel a member for misconduct unless it was prejudicial to the welfare or reputation of the club; and that the fact that the relator had made himself an undesirable member was not a sufficient cause for expulsion. The dissenting opinion held that the court could not review the sufficiency of the cause so long as the expulsion was made in good faith.

The dissenting opinion is well supported by authorities where a mandamus is sought against: (1) Beneficial corporations, Com. v. Pike Society, 8 S. & R. 247 (Pa. 1844); (2) Unincorporated clubs, Loubat v. LeRoy, 15 Abbott's N. C., 1, 32 (N. Y. 1884); Lyttleton v. Blackburne, 45 L. J. Ch. 219 (Eng. 1875); and in Dawkins v. Antrobus, 17 Ch. Div. 615 (Eng. 1881), Justice Brett, on page 630, goes so far as to say that even though the expulsion is unreasonable, the court will not interfere unless there was *mala fides.* (3) Incorporated clubs, U. S. v. Metropolitan Club, 11 App. D. C. 180, 201 (1898), holding that there is a presumption of good faith; Com. v. Union League, 135 Pa. 301 (1896), practically overruling the effect of Evans v. Phila. Club, 50 Pa. 107 (1865), in which it was said *obiter* (because the club was held to be a money corporation on very slight grounds) that a member

could not be expelled for a single act of disorder and that a by-law authorizing expulsion for such a cause was void.

The authorities for the majority opinion are *dicta* in People v. Uptown Ass'n, 9 App. Div. 191 (1896), and *In re* Haebler v. N. Y. Exch., 149 N. Y. 414 (1896). It may be supported on the theory, however substantial, that a corporation being a creature of the law, a court of law may see to it that a member is not expelled except for a legally sufficient cause. Medical Society v. Weatherly, 75 Ala. 248, 254 (1883).

At common law, a corporation had the inherent power to expel a member if he was guilty of (1) an indictable offense; (2) an act against the society which tended to its destruction or injury. A provision in the charter was necessary to expel for lesser offenses, Evans v. Phila. Club, 50 Pa. 107 (1865).

MASTER AND SERVANT—THE MASTER'S DUTY TO MAKE THE PLACE OF EMPLOYMENT SAFE.—The plaintiff, a lumberman in a mine, was injured as a result of the fall of supports made of defective material. It was not his duty to inspect this portion of the mine, but merely to use it as a passage to the place where he was repairing timber. *Held*, the master has a non-deligable duty to provide a safe place of employment for his servants. His failure to do so is not one of the risks of the servant's trade. Jackson v. Yak Mining, Milling and Tunnel Co., 119 Pacific Rep. 1058 (Colo. 1911).

The general rule is that, although the master must provide a safe place of employment for his servants, his duty is not absolute, the master being bound to use only reasonable care. He can not, however, relieve himself of liability by delegating the duty to another, if that other fails to use reasonable care and prudence in providing a safe place. Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642 (1885); Bailey v. R. W. & O. R. R. Co., 139 N. Y. 302 (1893); Toy v. U. S. Cartridge Co., 159 Mass. 313 (1893). The fact that the master did not know of defects makes no difference, if they could have been discovered by the exercise of reasonable care. Braun v. Chicago R. I. & P. R. Co., 53 Iowa, 595 (1880). But the master is not liable to a servant who is employed to remedy the defect or put the place in a safe condition, if he is injured while doing so. Murphy v. Boston & Albany R. R. Co., 88 N. Y. 146 (1882); Maloney v. F. & C. C. R. R. Co., 39 Colo. 384 (1907).

So also, a person entering into a certain business or occupation assumes the risk of all the ordinary and usual accidents attached thereto. Chicago City R. R. Co. v. Leach, 104 Ill. 30 (1902). And the servant also assumes all the risks which are open and apparent to the average man of his profession by continuing in the master's employ. Horte v. Fraser, 104 Ill. 201 (1902).

Whether or not any particular case comes within either of these exceptions is, in reality, a question of fact.

MUNICIPAL CORPORATIONS—LIABILITY OF A CITY FOR INJURIES TO A PEDESTRIAN.—A pedestrian, injured by a limb falling from a tree overhanging the sidewalk, cannot recover under a statute authorizing an action by one injured from a defective highway against the party required to keep it in repair. Dyer v. City of Danbury, 81 Atl. Rep. 958 (Conn. 1911).

As a general rule, the power of a city over its streets and the right of the public to find them safe extends upward indefinitely; and the duty of a city in this respect is commensurate with its power. Grove v. Fort Wayne, 45 Ind. 429 (1873). This doctrine is based upon the soundest considerations and is generally followed by the cases outside of New England. Hume v. New York, 74 N. Y. 264 (1877); Denver v. Shenet, 88 Fed. Rep. 226 (1897); Cincinnati v. Frazer, 18 Ohio Cir. Ct. R. 50 (1899); 4 Dill., Mun. Corp., 5th ed., Sec. 1705, and cases therein. The corporate authorities, however, are only bound to use reasonable skill and diligence in making the highways safe. They are not obliged to provide for everything that can possibly

happen, but only for such things as ordinarily exist or as may be reasonably expected to occur. Rerig v. Cohoes, 77 N. Y. 83 (1878); Dreher v. Fitchburg, 22 Wis. 675 (1867); Richford v. Hildebrand, 61 Ill. 155 (1871).

In the United States, however, there is no common-law obligation resting upon *quasi* corporations such as counties, townships or New England towns, to repair highways, and they are not obliged to do so except by statute. The general trend of the decisions is to regard such statutory duties as of a public, not a corporate, nature; and consequently to consider municipal corporations, in this respect, public or state agencies, not liable to be sued civilly for damages caused by their neglect, unless such a liability is imposed by the express words of a statute. 4 Dill., Mun. Corp., 5th ed., Sec. 1688. The liability of the New England towns depends, therefore, upon the statutes of the particular state in which they are located. Thus, in Massachusetts, where the statute requires towns to keep their highways safe, the municipality would be liable for injuries received from branches falling in the street. Drake v. Lowell, 13 Metc. 292 (Mass. 1847); Day v. Milford, 5 Allen, 98 (Mass. 1862). But where, as in Connecticut and Rhode Island, towns are not required by statute to keep their highways safe, but only in good repair, the doctrine of the principal case has always been followed. Hewison v. New Haven, 34 Conn. 136 (1867); Taylor v. Peckham, 8 R. I. 349 (1871).

MUNICIPAL LAW—REASONABLE ORDINANCES.—In the absence of facts showing unjust discrimination, a municipal ordinance prohibiting the maintenance of public laundries in a part of the city, designated by a prior ordinance as a residential section, cannot be said to be unreasonable. *Ex parte* Quong Wo, 118 Pac. Rep. 714 (Cal. 1911).

The opinion of the court was that the question of the necessity for restricting the operation of a business in certain portions of a city, on the grounds of the protection of the public health, was one primarily for the determination of the city council. Unless, therefore, the regulation had no relation to health, etc., but clearly invaded personal or property rights under the guise of police regulation, the court should not disturb its operation.

As a general rule the question of the validity of a municipal ordinance is for the determination of the court and not the jury. 2 Dillon, Mun. Corp. (5th Ed.), sec. 941. In certain cases, however, the jury may decide whether or not the ordinance is reasonable. At. & Pac. Tel. Co. v. Phila., 190 U. S. 160 (1902). When the unreasonableness of a municipal ordinance is not apparent on its face, the burden of proof is on the party attacking the ordinance, to show its unreasonableness. City of N. Y. v. Dry Dock, E. B. & B. R. Co., 15 N. Y. Sup. 297 (1891). The question of the reasonableness or unreasonableness of an ordinance is to be determined by its actual operation in all cases that may be brought under it, and not by the quality of the offense it seeks to prevent. People v. Armstrong, 73 Mich. 288 (1889). But any ordinance may be declared void for unreasonableness if it is oppressive, unequal, unjust, or altogether unreasonable. City of Lamar v. Weidman, 57 Mo. App. 507 (1894). Thus an ordinance which imposes excessive punishment will be declared invalid. Ho Ah Kow v. Nunan, 5 Sawy. 552 (Cal. 1879); Commonwealth v. Wilkins, 121 Mass. 356 (1876). But an ordinance imposing a minimum fine higher than that imposed by the state statute for the same offence is not, *per se*, unreasonable. City of Quincy v. O'Brien, 24 Ill. App. 254 (1887). An ordinance which discriminates between classes or individuals cannot be upheld. Harrison v. People, 97 Ill App. 421 (1901); City of Shreveport v. Robinson, 51 La. Ann. 1314 (1899); State v. Elofson, 86 Minn. 103 (1902). So, too, an ordinance which will involve destruction of, or injury to, property, may be declared unreasonable in the absence of cogent reasons requiring its enactment. Wallace v. City of Richmond, 94 Va. 204 (1897). Similarly, where the ordinance invades private rights in general. Chicago League Ball Club v. City of Chicago, 77 Ill. App. 124 (1898).

See also 2 Dillon, Mun. Corp. (5th Ed.), secs. 927-944.

NEGLIGENCE—LIABILITY FOR CARELESS USE OF AN X-RAY MACHINE.—The defendant, a physician, negligently treated the plaintiff's hand with an X-ray machine. The plaintiff had expressly agreed to assume the risk of the danger incident to the treatment. It was held that such assumption was limited to the risks attendant upon the use of the machine in a careful and skilful manner. Hales v. Raines, 141 S. W. Rep. 917 (Mo. 1912).

In arriving at its conclusion the court held that the risk assumed by the plaintiff was analogous to that which is assumed by a servant as ordinarily incident to his employment. It is generally held that a servant does not assume the risk of his master's negligence. Bigelow on Torts, page 371 and cases cited; Railroad v. Spangler, 44 Ohio St. 471 (1886). Even an express contract exempting the master from liability for negligence in the performance of his personal duty towards the servant has been declared illegal as being contrary to public policy. Roesner v. Herman, 8 Fed. Rep. (C. C.) 782 (1881); Railroad v. Eubanks, 48 Ark. 460 (1887); Hissong v. Railroad, 91 Ala. 514 (1891); Railroad v. Spangler, *supra*. A contrary doctrine is in force in Georgia. New v. Railroad Co., 116 Ga. 147 (1902). But see Thompson on Negligence, Vol 2, page 1025, for a criticism of this doctrine.

The question of what constitutes negligence in the use of an X-ray machine was considered for the first time in Henslin v. Wheaton, 91 Minn. 219 (1904). It was there held that the test is the same as is applied to any other treatment given by a physician. The defendant must show that he exercised the care, skill and judgment ordinarily exercised by reputable physicians of the neighborhood. Wood on Master and Servant, page 344; Patten v. Wiggen, 51 Me. 594 (1862); Shockley v. Tucker, 127 Ia. 456 (1905). In the last named case the fact that the patient was severely burned was held sufficient to establish that the treatment was improper. In this particular the case is seldom followed.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS A DEFENSE TO AN ACTION FOR VIOLATION OF A STATUTE.—A North Dakota statute provides that anyone who unlawfully sells certain illuminating oils below an official standard temperature shall be liable to any person injured thereby for any damage to person or property arising from any explosion thereof. 2223 R. C. 1905. In an action for damages for injuries sustained as a result of an explosion of oil sold in violation of the statute, it was held that the act did not abrogate the defense of the contributory negligence of the person injured, where such negligence was the proximate cause of the explosion. Morrison v. Lee, 133 N. W. Rep. 548 (N. Dak. 1911).

The case depended largely upon the legislative intent; but the general rule is, that where the negligence of the defendant consists in the violation of a statutory duty, the contributory negligence of the plaintiff may be pleaded as a defense to an action for damages as in other cases. Field v. Chicago, etc., R. Co., 14 Fed. 332 (1882); Alabama, etc. R. Co. v. Jones, 73 Miss. 110 (1895); Reynolds v. Hindman, 32 Iowa 146 (1871); 1 Thomp., Neg., 210, and cases cited. In some states this rule is modified. Under a Tennessee statute prescribing precautions to be used by railroad companies to avert injuries, contributory negligence will not defeat a recovery, but will merely operate in mitigation of damages. Louisville, etc., R. Co. v. Howard, 90 Tenn. 144 (1891).

A few courts hold that a "wilful" violation will take away the defense, declaring that the public policy of the state forbids the defense of contributory negligence in actions founded on "wilful" violation of their statutes. This is, however, more strictly in the nature of a purely punitive provision. Carterville Coal Co. v. Abbott, 181 Ill. 503 (1899); Western Anthracite Coal & Coke Co. v. Beaver, 192 Ill. 333 (1901).

PARTNERSHIPS—WHAT CONSTITUTES A PARTNERSHIP?—Two men together purchased a property for use as offices. Title was taken in the name of one of them, who paid the entire purchase price, but agreed to convey to his

colleague a half interest in the property upon payment by the latter of half the purchase price. After the purchase both contributed equally for repairs. Later the holder of the title refused to carry out his agreement to convey a half interest. A bill was brought demanding an accounting of the profits from the house as partnership property. The court held that the common purchase or ownership of property does not of itself create a partnership between the parties, even though it is used for the purpose of making gains; and that to set up a partnership there must be an intent to enter into a partnership contract. Spurlock v. Wilson, 142 S. W. Rep. 363 (Mo. 1911).

It is clear that a partnership may be created by an agreement between parties to become jointly interested in the purchase of land, the cost of which is to be borne equally between them, Corey v. Caldwell, 86 Mich. 570 (1891); King v. Barnes, 4 N. Y. 893 (1886); and that real estate purchased by several persons who have community of ownership and interest, is partnership property, notwithstanding title is taken in the name of one of the partners. Heard v. Wilder, 81 Iowa, 421 (1890); Jones v. Davies, 60 Kan. 309 (1899). But the mere joint ownership of real estate does not create a partnership therein without a special contract to that effect. Benton v. Roberts, 4 La. Ann. 216 (1849); Houssels v. Jacobs, 178 Mo. 579 (1903); and joint purchasers, without an agreement of partnership, are not entitled to the remedies, or subject to the responsibilities, of partners. 1 Penrose & Watts, 140 (Pa. 1829).

Furthermore, a partnership cannot be implied from a business relation, if the parties thereto have not made or intended to make a partnership contract. Beecher v. Bush, 45 Mich. 188 (1881). In Levy v. Brush, 45 N. Y. 589 (1871) and Holton v. Guinn, 76 Fed. 96 (1896) there was a purchase of land by one party, with an agreement by him to convey a half interest to another upon payment of half the purchase price, and the land was held not to be partnership property.

The situation arises most frequently in transactions in which one party furnishes the capital for a real estate speculation, and the other does the buying. Without a clear intent to become partners, the relation as between the parties *inter se* is always held not to be a partnership. Mayfield v. Turner, 180 Ill. 332 (1899); Thompson v. Holden, 117 Mo. 117 (1893); Norton v. Brink, 75 Neb. 566 (1906); Clark v. Emery, 58 W. Va. 637 (1906); Seymour v. Freer, 8 Wall. 202 (U. S. Sup. Ct. 1868).

PROCEDURE—MATTERS WHICH MAY BE ARGUED ON AN APPEAL BY AN INFANT.—An infant plaintiff, represented by a guardian *ad litem*, may not complain on appeal, of errors not affecting his substantial rights, when experienced counsel failed to make objections and save exceptions at the trial and where there is no evidence of fraud or collusion on the part of counsel. Byrnes v. Butte Brewing Co., 119 Pac. Rep. 788 (Mont., 1911).

The general rule is that a guardian *ad litem* or next friend can make no concessions. He can not waive or admit away any of the substantial rights of the infant or consent to anything which may be prejudicial to him. He must deny and put in issue every material fact alleged. Evans v. Davies, 39 Ark. 235 (1882); Turner v. Jenkins, 79 Ill. 228 (1875); Collins v. Trotter, 81 Mo. 275 (1883). A good illustration of this rule may be found in Jesperson v. Mech, 213 Ill. 488 (1905), where it was held that the incompetency of hearsay evidence was not waived, by failure to make objections, in cases in which infants are parties. And if admissions are made the infant may have a review of the case. Hooper v. Hardie, 80 Ala. 114 (1885):

The guardian *ad litem* may assent, however, to arrangements which merely facilitate the trial and the infant is bound thereby. Kingsbury v. Buckner, 134 U. S. 650 (1889).

PROPERTY—CREATION OF EASEMENTS BY IMPLICATION.—A tract of land contained, in part, a garden, stable and yard, with a road leading to them from the highway. The testator devised only the garden and stable to his wife. In determining whether the widow was entitled to an easement in

the private road for the benefit of the garden and stable, it was held that the creation by implication of a right of way appurtenant to land, depends upon the intention of the parties as shown by the instrument granting the land. An absolute, strict necessity for the way is not indispensable. Fisheries Co. v. Tolman, 97 N. E. 54 (Mass., 1912).

This case follows the general line of cases on the creation of easements by implication on the grant of land by deed. All cases agree that where there is an absolute necessity for the way, it is impliedly created. Lanier v. Booth, 50 Miss. 410 (1874); Brakely v. Sharp, 9 N. J. Eq. 9 (1852), and 10 N. J. Eq. 206 (1854). But where the degree of necessity is less, there is not such a unity of decision. See comment of Dodge, J., in Miller v. Hoeschler, 126 Wis. 263 (1905).

A reasonable necessity as distinguished from a mere convenience is required in Wells v. Garbutt, 132 N. Y. 430 (1892), and Dillman v. Hoffman, 38 Wis. 559 (1875). In New Jersey, it has been held that if the easement was necessary for the convenient and comfortable enjoyment of the property as it existed at the time the grant was made, it would be implied. Kelly v. Dunning, 43 N. J. Eq. 62 (1887). And Vice-Chancellor Pitney went so far as to say, "Where the right to the easement is based upon the ground that it passes as in substance a valuable adjunct to the land conveyed, the element of necessity is not a requisite." Toothe v. Bryce, 50 N. J. Eq. 589 (1892). One case lays down a very fair and reasonable rule,—that the degree of necessity is to be determined by the permanency, apparent purpose and adaptability of the disposition made by the owner during the unity of title. Insurance Co. v. Patterson, 103 Ind. 582 (1885).

REAL PROPERTY—COMPLETION OF TITLE BY THE PRESUMPTION OF A GRANT.—The defendant who had paid taxes and cut trees on an uncultivated tract of land for thirty years claimed title under a deed which stated that title was vested in his remote grantor by sundry good conveyances. No paper title in favor af the remote grantor was shown. It was held that after title has been unchallenged for a long time the court will presume whatever grant may be necessary to quiet it. Dougherty v. Welchans, 233 Pa. 121 (1911).

The courts at an early date, in order to quiet title to land, adopted the rule that a grant would be presumed. Where a person held land openly and notoriously as his own and adversely to the owner of the proper title, for a long time, the courts said that the owner of the paper title must have made a grant to the adverse holder. Rooker v. Perkins, 14 Wis. 79 (1861); Burdick v. Henly, 23 Iowa 511 (1867).

As a natural consequence, when the person in possession of land has a chain of title in which there is a break, if the present person in possession and his predecessors have held the land since the break for the period of the staute of limitations, the chain of title will be completed. Taylor v. Dougherty, 1 W. & S. 324 (Pa. 1841); Carter v. Tinicum Fishing Co., 77 Pa. 310 (1875).

The presumption of a grant at the present day has become so strong that it cannot be rebutted by showing that as an actual fact there was no grant. The only way of rebutting the presumption is by contradicting or explaining the facts upon which it rests. Lehigh Valley R. R. Co. v. McFarlan, 43 N. J. L. 605 (1881); Melvin v. Waddel and Little, 75 N. C. 361 (1876).

What amounts to possession must be decided under the peculiar facts of each case. In general, it may be said that in case of cultivated land there must be actual physical possession; but it has been held that if the land has not been cultivated, actual improvement and payment of taxes constitute possession. Royer v. Benlow, 10 S. & R. 303 (Pa. 1823).

SALES—IMPLIED ACCEPTANCE BY THE BUYER.—By the contract of sale the earnest money which the vendee paid was to be returned if the machine proved unsatisfactory. The vendee mortgaged the machine to the plaintiff before it

was completely tested, purporting to give the mortgagee the right to recover the earnest money. In an action by the mortgagee against the vendor for the earnest money it was held to be a question for the jury whether the facts constituted an acceptance so as to preclude the vendee from ever rejecting the machine as unsatisfactory. Harrison v. Scott, 96 N. E. Rep. 755 (N. Y. 1911).

The general rule is that an acceptance will be implied: (1) Where the vendee has failed to give notice of non-acceptance within a reasonable time. Bushel v. Wheeler, 15 A. & E. (N. S.) 442 (Eng. 1844); Baltimore Brick Co. v. Coyle, 18 Pa. Super. 186 (1901); MacEvoy v. Aronson, 46 N. Y. Misc. Rep. 622 (1905). (2) Where some overt act, indicating the assumption of ownership, has been done by the vendee.

Among the acts from which acceptance will be implied are: (a) Re-sale. Phillips v. Ocmulgee Mills, 55 Ga. 633 (1876); Plow Co. v. Meredith, 107 Iowa 498 (1899). But an attempt to re-sell is not necessarily an acceptance. Morton v. Tibbett, 15 A. & E. (N. S.) 428 (Eng. 1850); Jones v. Bank, 29 Md. 287 (1868). (b) Use or operation. Zipp Mfg. Co. v. Pastorino, 120 Wis. 176 (1904); Brown v. Foster, 108 N. Y. 387 (1888). (c) Mortgaging the goods. Van Winkell v. Crowell, 146 U. S. 42 (1892); Wyler v. Rothschild, 53 Neb. 566 (1898).

Acceptance, being a fact and a matter of intention, is a question for the jury, Morton v. Tibbett, *supra;* Jones v. Reynolds, 120 N. Y. 213 (1890), except where the assumption of ownership is so pronounced, as in the case of a mortgage, that the acceptance will be conclusively presumed. Although in the principal case the goods were mortgaged, it does not come within the foregoing exception because of its peculiar facts, inasmuch as the mortgage only purported to give the mortgagee the right to recover the earnest money and not a defeasible title to the goods; and at the date of mortgage no satisfactory test of the machine had been made.

SALES—RE-SALE OF REJECTED GOODS BY THE VENDEE.—The vendee of a car-load of turkeys gave notice to the vendor, on the day of the delivery and after inspection, that the turkeys were not as ordered, and that they would be turned over to a commission merchant to be sold on the vendor's account. The vendor made no answer, but when the merchant returned the proceeds of the sale he refused them and sued the vendee for the price of the turkeys. The vendor was not allowed to recover, on the ground that the evidence was insufficient to allow the jury to imply an acceptance of the goods by the vendee. White v. Schweitzer, 132 N. Y. Sup. 644 (1911).

The vendee has a right to inspect the goods and reject them if they are not made in accordance with the contract, notwithstanding the fact that title has already passed to him. Billmeyer v. Queen Manufacturing Co., 150 Iowa 318 (1911). Acceptance of the goods by the vendee may be implied where he does some act in relation to them which necessarily involves the conclusion that he has taken them as owner. Williston on Sales, (1909), secs. 77, 483. In the normal case, a re-sale by the vendee is regarded as conclusive evidence of an acceptance. Plow Co. v. Meredith, 107 Iowa 498 (1899); Walcott v. Richman, 94 Me. 364 (1900).

If the vendee refuses to accept the goods he must give the vendor notice of the rejection and take reasonable care of the goods, but he need not return them. Williston, Sales, (1909), sec. 497; Grimoldby v. Wells, L. R. 10 C. P. 391 (1875); McCormick Co. v. Chesrown, 33 Minn. 32 (1884). While the goods are in the vendee's hands, awaiting removal by the vendor, they are at the latter's risk, even though title had passed to the vendee, for it is said that the rejection re-vests the title in the vendor. Doane v. Dunham, 79 Ill. 131 (1875).

That the vendee may store and insure the goods at the expense of the vendor, after notice to him of the rejection, is unquestioned. It is a settled but anomalous doctrine, that if the vendee re-sells the goods, acting on behalf of the vendor, the re-sale will not be regarded as an acceptance of the

goods so as to make the vendee liable for the contract price. In the principal case the vendee gave notice that the goods would be re-sold, but there are cases which do not require the expression of such an intention. Descalzi Fruit Co. v. Sweet, 30 R. I. 320 (1910); Rubin v. Sturterant, 80 Fed. 930 (1897); Strauss v. National Furniture Co., 76 Miss. 343 (1899). It is to be noted that in the last two cases the goods were not perishable.

SUNDAY STATUTES—WHAT IS NECESSARY WORK?—In a jurisdiction where a statute prohibited all work on Sunday save that of charity and necessity it was held that the sending of a telegram by a husband to his wife notifying her that he would not return as expected, is a work of necessity. "If its only purpose was to have a tranquil effect on the mind of the wife, the necessity is shown." Tel. Co. v. Fulling, 96 N. E. Rep. 967 (Ind., 1912).

Courts in construing the term "necessity" as employed in these statutes have generally given it a liberal, rather than a literal, interpretation, and have declared that it is not an absolute, unavoidable, physical necessity that is meant, but rather an economic and moral necessity. 24 Am. & Eng. Enc. Law 541. The following lines of work have been held to be necessary within the exception of these statutes: Delivering of milk on Sunday, Topeka v. Hempstead, 58 Kan. 328 (1897); repairing railroad tracks which could be done without delay of trains only on Sunday, Yonoske v. State, 79 Ind. 393 (1881); repairing a factory belt on Sunday so as to prevent two hundred persons from losing a day's work on Monday, State v. Collett, 72 Ark. 167 (1904); pumping out an oil well where material loss would have resulted to the owner if he had not done so on Sunday. State v. McBee, 52 W. Va. 257 (1903).

But the fact that an act can be more conveniently or more cheaply done on Sunday, or that it has been rendered necessary by a lack of foresight, does not render it "necesary" within the meaning of the statute. It is not necessary for a butcher to sell meat on Sunday because his customers prefer not to purchase on the previous day, Arnheiter v. Ga., 115 Ga. 572 (1902); nor for a barber shop to remain open on Sunday for the general transaction of business, State v. Shoper, 25 Wash. 318 (1903); nor to harvest wheat on Sunday, although it was wasting from over-ripeness, State v. Goff, 20 Ark. 289 (1859); nor to haul a thresher on Sunday in order to have it in place to begin contract work on Monday morning. State v. Suckey, 98 Mo. App. 664 (1903).

SURETYSHIP—NECESSITY FOR ACCEPTANCE OF A GUARANTY.—The defendant guaranteed the faithful performance of a sales agent's contract providing for future sales, and also guaranteed payment of any sums then due plaintiff under previous similar contracts. *Held*, that no notice of acceptance was necessary to establish liability for an existing indebtedness; but otherwise as to a future indebtedness. Watkins Medical Co. v. McCall, 133 N. W. Rep. 966 (Minn., 1911).

Where the guaranty is an original undertaking, absolute and unconditional, it is generally held that notice of acceptance is not necessary. Cowan v. Roberts, 134 N. C. 415 (1904); Louisiana & W. R. Co. v. Dillard, 51 La. Ann. 1484 (1899); Wise v. Miller, 45 Ohio St. 388 (1887); Globe Printing Co. v. Bickley, 73 Mo. App. 499 (1898); Wilcox v. Draper, 12 Neb. 138 (1881). The last named case contains a thorough discussion of the question. In Medical Co. v. McCall, *supra*, the guaranty of the past indebtedness was held absolute and unconditional.

If the guaranty is a conditional one, the guarantor is generally held to be entitled to notice of acceptance. The courts seem to be in hopeless conflict on the question as to when the guaranty is conditional. In some cases a guaranty of the performance of a contract of agency is binding in the absence of notice of acceptance, the theory being that the guarantor, knowing the terms of the contract, knows exactly the extent of his responsibility. Liringer & M. Co. v. Wheat, 49 Neb. 567 (1896); Davis Sewing Machine

Co. v. Jones, 61 Mo. 409 (1875); Johnson v. Bailey, 49 Tex. 516 (1891). Other cases adopt the theory that the guaranty is a mere offer, and is not binding until the party making the offer is notified of its acceptance, which can only be after the original contract is completed. Barnes Cycle Co. v. Schofield, 111 Ga. 880 (1900); Coe v. Buehler, 110 Pa. 366 (1885); Deering Co. v. Sulser, 78 Mo. App. 670 (1898); Barnes Cycle Co. v. Reed, 84 Fed. (C. C.) 603 (1898). In Davis v. Wells, Fargo Co., 104 U. S. 159 (1881), the court announced its adherence to this theory, but held that the guarantor had received notice of acceptance.

For a complete discusion of the subject see note in 16 L. R. A. (N. S.) 352.

TORTS—IMPUTED NEGLIGENCE.—A car inspector was injured as the result of the concurrent negligence of his helper and the defendant company. *Held,* that the helper's negligence could not be imputed to the plaintiff. Rosenbaum Grain Co. v. Mitchell, 142 S. W. Rep. 121 (Tex. 1912).

Where one occupying the relation of master or principal is injured by the concurrent negligence of his servant or agent and a third party, there can be no recovery, it being generally held that negligence of the servant is imputable to the master. Louisville R. R. Co. v. Stommel, 126 Ind. 35 (1890); Corson v. R. R. Co., 147 Penna. 21 (1892); Water Co. v. Schneider, 62 Ark. 109 (1896); Read v. R. R. Co., 115 Ga. 366 (1902); R. R. Co. v. Chatterson, 14 Ky. L. R. 663 (1893). The last case is rather extreme, showing a tendency to follow the famous case of Thorogood v. Bryan, 8 C. B. 115 (1849).

If two persons are joint enterprisers, each having equal authority and rights, and one is injured by the concurrent negligence of his companion and a third party, there can be no recovery. The court in the principal case refuses to accept this proposition on the ground of its unreasonableness. While it is hard to discover the reason for the rule, a review of the cases indicates that it is widely accepted as sound. Koblitz v. St. Paul, 86 Minn. 373 (1902); Cass v. Third Ave. R. Co., 20 App. Div. 591 (N. Y. 1897); Omaha R. R. Co. v. Talbot, 48 Neb. 628 (1896); Slater v. R. R. Co., 71 Ia. 209 (1887).

Where the injury results from the concurrent negligence of a co-servant and a third party, the co-servant's contributory negligence is no defense to the third party. Chicago & A. R. R. Co. v. Harrington, 192 Ill. 9 (1901); McKernan v. Citizens R. Co., 138 Mich. 519 (1904); Baxter v. Transit Co., 103 Mo. App. 597 (1903); Murray v. Boston Ice Co., 180 Mass. 165 (1901).

In Grain Co. v. Mitchell, *supra,* the court failing to find the relation of principal and agent between the car-inspector and his helper, and denying the doctrine of imputed negligence in the case of joint enterprisers, allowed the plaintiff to recover. There was a strong dissenting opinion.

For a review of the subject see L. R. A. (N. S.), Vol. 8, page 597.

TORTS—LIABILITY OF MUNICIPAL LIGHTING COMPANY FOR FAILURE TO KEEP ITS WIRES INSULATED.—Failure of an electric lighting company to repair the insulation on its wires as required by municipal ordinance, is negligence *per se,* even though the wires are strung thirty feet above the highway. This was the decision in Ladow v. Electric Co., 119 Pac. Rep. 250 (Okla. 1911), where a linesman who while repairing the wires of a telephone company had unknowingly stepped upon the wires of an electric light company attached to a pole only a few inches from the pole upon which he was working, was allowed to recover for the injury resulting from the shock. The court held that the violation of the ordinance imposed an absolute liability, regardless of the amount of duty and care owed to the particular person.

This case, in general, follows the weight of authority, but is somewhat stronger than most of the decided cases. There seems to be a rather strict imposition of liability where there is a violation of an ordinance

which aims to afford protection against a highly dangerous object. In Mitchell v. Raleigh Co., 129 N. C. 166 (1901), the absence of insulation from an electric wire, when a city ordinance provided for such insulation, was held *prima facie* evidence of the negligence. In Knowlton v. Des Moines Light Co., 117 Iowa, 451 (1902), it was held negligence to employ a different kind of insulation from that required by ordinance. Where a person, whose occupation brings him into proximity to electric wires, knows that an ordinance requires their insulation, he has a right to assume that the ordinance has been complied with, and need not take extra precaution to avoid contact with the wires. Clements v. Louisiana Light Co., 44 La. Ann. 692 (1892); Commonwealth Electric Co. v. Rose, 114 Ill. App. 181 (1904), and 214 Ill. 545 (1905).

Even where there is no ordinance requiring the protection of electric wires, there exists a common law duty of so guarding a dangerous instrument that it will not injure persons who may inadvertently come in contact with it. Anderson v. Jersey City Light Co., 63 N. J. L. 387 (1899); Wagner v. Ry. Co., 74 N. Y. Supp. 809 (1902), affirmed 174 N. Y. 520 (1903).

TORTS—LIABILITY FOR FALSE TESTIMONY.—A witness who, pursuant to a conspiracy made with others, gives false testimony, which results in a miscarriage of justice, is not liable civilly to the party injured thereby; nor is the instigator of the perjury liable to the party injured when the latter is in privity with one of the parties to the suit. Schaub v. O'Ferrall, 81 Atl. Rep. 790 (Md. 1911).

A witness while in the box is absolutely privileged in answering all the questions asked him by counsel on either side, and even in volunteering information. Seaman v. Netherclift, 46 L. J. C. P. 128 (Eng. 1876). This exemption from civil liability is generally followed in the American courts, with the qualification that the statements made in the course of an action must be pertinent and material to the case. McLoughlin v. Cowley, 127 Mass. 316 (1879). But a remark made by a witness in the box, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purposes only, would not ever be privileged. Odgers Lib. and Sland., p. 214. So, of course, an observation made by a witness while waiting about the court, before or after he has given his evidence, is not privileged. Trotman v. Dunn, 4 Camp. 211 (Eng. 1815). Whether or not the statement is relevant to the issue and therefore privileged is, of course, a question for the court. The doctrine of the American courts in general is clearly set forth in Ames' Cases on Torts, p. 457, n., and is in accord with McLoughlin v. Curley, *supra*.

An action on the case, however, will lie against a person who suborns witnesses to testify falsely in an action whereby a stranger to the suit is injured in reputation and suffers loss. Rice v. Coolidge, 121 Mass. 393 (1876). But no action will lie if the plaintiff was a party to the prior action in which the testimony was given, or in privity with a party thereto. Smith v. Lewis, 3 Johns, 157 (N. Y. 1802); Dunlap v. Glidden, 31 Me. (1850). *Cf.* Hoosac Tunnel, Dock & El. Co. v. O'Brien, 137 Mass. 424 (1884). Thus in the principal case the plaintiff, who was both the attorney and assignee in the prior action, was not allowed to recover against the instigator of the false testimony. The reason for the above rule seems to be the necessity of limiting litigation upon the same issue, which would otherwise be necessarily reopened. Taylor v. Bidwell, 65 Cal. 489 (1884).

TORTS—LIABILITY OF A CHARITY FOR THE TORTS OF ITS SERVANTS.—In Kellogg v. Church Charity Foundation, 96 N. E. Rep. 406 (N. Y. 1911), the plaintiff sought to fix liability on the defendant hospital for a personal injury caused by the negligence of the driver of its ambulance in running into the plaintiff on a public street. The court of appeals of New York flatly repudiated the "trust fund theory" as exempting the charity from liability to a stranger. For a discussion of this theory, see 58 Univ. of Penna. Law Review,

428. In Hordern v. Salvation Army, 199 N. Y. 333 (1910), this same court said that where the plaintiff was a beneficiary of the charity the immunity of the charitable trust applied.

The contention of the defendant was that, being a charitable corporation, the rule *respondeat superior* has no application. The question of how far charities shoull be exempt from liability in tort has given rise to great divergence of opinion. See 28 Am. L. Reg. (N. S.) 669, and 29 Am. L. Reg. (N. S.) 209. Such immunity exists in certain cases in every jurisdiction; and in many states the immunity is unqualified, existing in all cases. Parks v. Northwestern Univ., 218 Ill. 381 (1905); Fire Ins. Patrol v. Boyd, 120 Pa. 624 (1888). But the extent of the immunity and the grounds on which it rests are the subjects of many diverse judicial views. For a review of the authorities and views, see 57 U. of P. Law Review, 426; Powers v. Hospital, 109 Fed. 294 (C. C. A. 1901); Bruce v. Church, 147 Mich. 230 (1907). In Massachusetts strangers have recovered. Mulchey v. Religious Society, 125 Mass. 487 (1878); Smethurst v. Church, 148 Mass. 261 (1889). But see Farrigan v. Pevear, 193 Mass. 147 (1906). And in at least two states the doctrine of total immunity has been repudiated. Bruce v. Church, *supra;* Hewett v. Hospital, 73 N. H. 556 (1906). It seems never to have existed in Rhode Island. Glavin v. Hospital, 12 R. I. 411 (1879). The tendency in recent years has been to get away from the total immunity rule; and in those jurisdictions where charities are still exempt from liability, the exemption is put upon firmer and more satisfactory grounds than the trust fund theory.

TORTS—LIABILITY FOR MAINTAINING AN "ATTRACTIVE NUISANCE" IN THE STREET.—The defendant company left a loose guy wire hanging from its pole at the side of the street. A boy of eleven, using the guy wire as a swing, brought it in contact with an insulated electric light wire and was killed. It was held that under the "attractive nuisance" doctrine the defendant was liable for damages. Pierce v. United Gas & Electric Co., 118 Pac. Rep. 700 (Cal. 1911).

The doctrine of attractive nuisances is one of the most discussed doctrines in tort law, and the recent opinions for and against it serve only to show that the various jurisdictions are hopelessly divided as to its application. Lynch v. Nurdin, 1 Q. B. (1841), is the pioneer case on the subject. Those jurisdictions which refuse to follow it, point out that in it the person injured did not trespass upon the defendant's close, although it is admitted that it did involve a trespass to personal property. The real origin of the modern doctrine may be said to rest upon what are called the "Turntable Cases," the first of which was Railroad Co. v. Stout, 17 Wall. 657 (1873), decided by the Supreme Court of the United States. Here the turntable was in a remote place wholly on ground belonging to the defendant. This case has been used as a guide by all those courts which have adopted the doctrine under discussion.

In most of the jurisdictions in which R. R. v. Stout has been followed, there seems to be a distinct tendency to limit its application to railroads maintaining turntables, or at the broadest to land-owners maintaining on their land attractive and dangerous machinery. Stendal v. Boyd, 73 Minn. 53 (1898); Savannah Ry. Co. v. Beavers, 113 Ga. 398 (1901); M., K. & T. R. R. Co. v. Edwards, 90 Tex. 65 (1896).

However, even in jurisdictions which absolutely repudiate the "attractive nuisance" doctrine, the principal case might be supported on the ground that the pole was placed on the highway, and that the child was where he had a right to be.

See note in 58 Univ. of Penna. Law Review, 233.

TRUSTS—LIABILITY OF TRUST ESTATE FOR BENEFITS RECEIVED THROUGH ABSCONDING TRUSTEE.—The Supreme Judicial Court of Massachusetts in a recent case affirmed the rule of Newell v. Hadley, 206 Mass. 335 (1910), that where a trustee of several estates embezzles funds of one to pay the

debts of another, the latter may be required in equity to make restitution, even though the trustee was also a defaulter as to it. Bremer v. Williams, 96 N. E. 687 (Mass., 1911).

This rule seems adverse to that of the English cases allowing creditors of an insolvent trustee to recover from the trust estate only where the trustee would have had a right to reimbursement from the trust estate if he had personally paid the claims. *In re* Johnson, 15 Ch. Div. 548 (1880); *In re* Frith, 1 Ch. 342 (1902). Most of the American decisions seem in accord. Norton v. Phelps, 54 Miss. 467 (1877); Owens v. Mitchell, 38 Tex. 588 (1873); Bushong v. Taylor, 82 Mo. 660 (1884); Mason v. Pomeroy, 151 Mass. 164 (1889). Of course where the trustee is a defaulter and owes the estate money at the time the action is brought, the plaintiff has no subrogation. A few jurisdictions have allowed recovery regardless of the trustee's right to indemnity, on the theory that the trust estate should pay for the benefit conferred upon it, the creditor not being made to suffer for the misconduct of the trustee. Wylly v. Collins, 9 Ga. 223 (1851). See also 2 Perry Trusts, 6th Ed., Sec. 815, note (b); 15 Am. L. Rev. 499; Manderson's Appeal, 113 Pa. 631 (1886).

The decision in Newell v. Hadley, *supra,* was placed upon the ground of agency; the defendant trust being regarded as principal and the fraudulent trustee as agent. The knowledge of the agent was thought imputable to the defendants, who, therefore, did not receive the benefits without notice of the plaintiffs' rights. This has been criticized on the ground that the agent, if properly so called, was interested adversely to the principal, and, also, because it fails to distinguish between agency and trusteeship in connection with the creditor's right against the principal and the trust *res* or *cestuis que trust,* respectively, thus ignoring the rule of *In re* Johnson, *supra.* See article by R. J. Baker, Esq., in 59 Univ. of Penn. Law Review 225: "The Application of Money Wrongfully Procured by a Defaulting Agent or Trustee to the Payment of the Debts of the Principal's Business or the Trust Estate."